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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. [redacted] 1925

No. [redacted] 257

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

ALVIN R. DURHAM COMPANY, AND FRED S. LARSON, ALIAS FRED M. LARSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

and

BRIEF IN SUPPORT THEREOF.

R. N. VAN DOREN,
FRANK A. BELL,
Counsel for Petitioner.

BURTHOLF-HARDEN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1924.

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ALVIN R. DURHAM COMPANY AND FRED S. LARSON, ALIAS FRED M. LARSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Chicago and North Western Railway Company presents this, its petition for a writ of certiorari to be directed to the Supreme Court of the State of Michigan to review a judgment rendered in said court on December 31, 1924, which judgment affirmed the judgment of the Circuit Court of Gogebic County, Michigan, in favor of respondent Durham Co. and against petitioner as garnishee.

The judgment sought to be reviewed is the second

entered in the State Supreme Court in this case. The case was originally tried in the lower state court in December, 1921, that court directing a verdict in favor of the garnishee. Plaintiff took the case to the State Supreme Court, which, on October 1, 1923, reversed the judgment of the trial court and remanded the case to the court below for a new trial. (Petition of garnishee to this court for Writ of Certiorari to review that judgment was denied April 28, 1924, because that judgment was not a final decree. 265 U. S. 580.) Such new trial was had, in May, 1924, and the trial court directed a verdict in favor of the plaintiff and against the garnishee, stating that it was bound by the decision of the State Supreme Court on the first appeal. (*Trans. 28.) Judgment was thereupon entered on such directed verdict and the garnishee, by due proceedings, took the case to the State Supreme Court, wherein, on December 31, 1924, judgment affirming said judgment of the trial court, with costs, was duly entered. (Trans. 32.) Which last mentioned judgment is the judgment which petitioner desires this court to review.

In support of its petition, petitioner respectfully shows the following statement of the matter involved and the general reasons relied on for the allowance of the writ:

Matter Involved.

1. This controversy arose in garnishment proceedings brought by the respondent Durham Company (hereinafter called plaintiff) against the petitioner under the Michigan garnishment statute (§ 13122-67, C. L. 1915) in an action in which the respondent Larson was defendant. In the proceeding below Larson and your

*These references to "Trans." are to the pages of certified copy of the record of the Michigan Supreme Court, as paged by its clerk.

petitioner were known as "principal defendant" and "garnishee defendant," respectively, and will, for convenience, be referred to herein as "defendant" and "garnishee" respectively.

2. A carload of apples was shipped from Ludington, Michigan, via Manitowoc, Wisconsin, to Ironton, Michigan, where it arrived on the 7th of October, 1921, at four o'clock P. M. The shipment moved under an "order bill of lading" and was billed to the order of shipper, "notify Fred M. Larson," the defendant. The following morning at eight o'clock the defendant presented the original order bill of lading to petitioner, which bore the proper endorsement showing he had paid the bank at Ironwood for the shipment. He then delivered this bill of lading to the garnishee's agent, paid the freight charges of $116.16 on the shipment, and gave to the said agent his receipt for the entire shipment. The car containing the shipment was then on a "team track," where defendant could drive to it for unloading. (Trans., 22-4.) At about eight o'clock that same morning the defendant commenced unloading the apples from the car and at nine forty-five that morning the writ of garnishment was served upon the garnishee's agent. (Trans., 23.) In the meantime, defendant had gone to the car with a drayman and an automobile truck; they entered the car, put the apples in baskets, and carried them out. Defendant was in the car from the time they opened it until the summons (writ in garnishment) was served (Trans., 8), and during that time, 8:20 to 9:45, defendant had unloaded one-quarter of the bulk of the apples. (Trans., 23.)

3. Thereafter, garnishee filed a disclosure showing that there was nothing in its possession at the time of service of the writ (Trans., 23, 24) and defendant completed the unloading of the remaining three-fourths

carload of apples during the next three days, disposing of them to various customers and collecting the money from them, without interference from either the plaintiff or the garnishee. (Trans., 8, 9, 25.) Defendant locked the car at night but kept no watchman there. (Trans., 8.)

4. Plaintiff, being dissatisfied with the disclosure, filed a demand under the statute for an oral examination of the garnishee and its said agent, alleging the averments of the disclosure to be incorrect and untrue. (Trans., 19-20.) The record in the trial court was made on that issue (Trans., 21, 22), it being stipulated by the parties that no question of fact was involved and that the court might dispose of the matter as one of law, directing a verdict for the party found by the court entitled thereto. (Trans., 10.)

5. On the trial of this issue before the court, plaintiff introduced in evidence the bill of lading covering the shipment in question, referring especially to conditions 5 and 10 on the back thereof and calling attention to the fact that the bill of lading was the uniform form of bill of lading and these conditions identical with those referred to in *Michigan Cent. R. R. Co.* v. *Mark Owen & Co.* 256 U. S. 427. (Trans., 4.) Plaintiff's counsel stated that plaintiff sought to hold the garnishee on an interstate shipment under the federal law and not under the state law. (Trans., 9.)

6. Plaintiff advanced the theory that because under the *Owen* case, *supra,* the garnishee would become liable to the defendant, as an insurer, in case of theft of the apples remaining in the car after the garnishment summons was served, it must therefore be held, upon authority of that decision, that the garnishee in this case had these apples in its hands and under its custody and control so as to be liable in this proceeding. Supporting this

theory, plaintiff asserted specifically that under the doctrine of the *Owen* case, *supra,* it must be held in this statutory garnishment proceeding that the apples remaining in the car had not been delivered to the defendant, but that access had only been given to them that they might be removed, and therefore they were "until actually removed from and out of said car, in the exclusive possession, custody and control of the Railway Company." (Trans., 12.)

7. The garnishee contended that for the purposes of the garnishment proceedings it must be held that at the time of service of the writ the possession of the entire carload of apples had passed from the Railway Company to Larson; that the delivery of the bill of lading, payment of freight charges, execution of a receipt by the defendant for the entire carload and his actual opening and entry of the car and exercising of complete dominion thereover in the unloading of one-quarter of the contents had created a situation which, as a matter of law, compelled the garnishee to make the disclosure which it did make, viz., that it had no property of the defendant in its possession and under its control at the time of service of the writ. (Trans., 19, 24.) As hereinbefore stated, the trial court felt itself bound by the decision of the Supreme Court on the first appeal, and accordingly, rendered judgment in favor of the plaintiff and against the garnishee. (Trans., 28.)

8. Upon *plaintiff's* appeal to the Supreme Court of Michigan (being the socalled first appeal), that court reversed the first judgment of the trial court. (Trans., 33.) In its opinion that court quoted Section 5 of the uniform bill of lading, and founded its decision upon the authority of the *Owen* case, concluding its opinion as follows:

"It is pointed out in the federal case cited that

> the contract between the parties continues the railway company as a carrier for forty-eight hours after notice is given to the consignee of its arrival as to the property not already removed within that time. If the position of the railway be that of carrier during the forty-eight hour period it must follow that it is, during that time, liable as a carrier. If the railway company be liable as carrier it must also follow that the apples remaining in the car before the expiration of that period are within the custody, control and possession of the carrier. We are impressed that under the foregoing construction of section 5 we must hold that defendant railway had property in its custody and under its control belonging to the principal defendant when the summons was served." (194 N. W. 1014, 1015.)

Upon *garnishee's* appeal (being the socalled second appeal, in which was entered the judgment of the State Supreme Court hereby sought to be reviewed) the State Supreme Court, by its judgment and in its opinion (Trans., 30, 31), adhered to its former decision, saying:

> "* * * we are still of the opinion that the interpretation given to section 5 of the uniform bill of lading by Mr. Justice McKenna in *Owen* v. *Michigan Central Railway, supra,* must determine the case adversely to the contention of the Railway Garnishee. The judgment is affirmed."

General Reasons Relied On.

1. The decision of the Michigan Supreme Court involves a federal question, viz., the construction of the terms of a bill of lading covering an interstate shipment and the application of this court's decision in *M. C. R. R.* v. *Owen & Co.* 256 U. S. 427, to the rights existing between plaintiff and garnishee under the state of facts hereinabove set forth. The rights given to plaintiff are by authority of federal statutes only—so asserted by the plaintiff and so held by the Supreme Court of Michigan.

2. The case is one of first impression, there being so

far as counsel have been able to ascertain, no other decision in either the federal or state courts where a railway company has been held liable as a garnishee under the same or similar circumstances, and particularly after having surrendered actual possession and control and having done everything in its power to turn the shipment over to the consignee, who then proceeded to take and was in the act of unloading the shipment when the garnishment writ was served.

3. The question involved is one of great importance to all shippers, consignees and carriers of interstate freight, since the bill of lading provisions involved are contained in the uniform bill of lading which is in general and practically universal use throughout the United States.

4. The decision, from a practical standpoint, if allowed to stand, would work a great hardship upon all interstate carriers, in this: If made responsible in garnishment proceedings wherein it was sought to reach property then being unloaded by a consignee, the carrier would in every case, in order to comply with the garnishment writ under this decision, have to take immediate and quite possibly, forcible means to eject the owner of the shipment from the car, in order that it might protect itself in the garnishment proceedings and make a disclosure therein admitting that it then had in its possession certain property of the defendant.

5. The decision in question misconstrues and misapplies the decision of this court in the *Owen* case by extending certain language used in the opinion to facts altogether different from those existing in the *Owen* case.

6. The decision improperly enforces the contractual rights existing between carrier and consignee, an-

nounced in the *Owen* case, in favor of a plaintiff having no contractual relation to the carrier.

7. The decision confuses an interstate carrier's bill of lading liability to a consignee as an insurer of the safety of goods not yet removed from the car, with the question of the actual possession and control of the goods which renders the carrier liable to respond as garnishee.

8. The decision confuses the question of the actual possession and control of the goods in the car at the time the writ was served (which is the test of liability under the garnishment statute involved), with the question of a possible future liability of the carrier to the consignee in case all or some part of the shipment remaining in the car might be stolen, a contingency which might never occur and did not in fact occur in this case.

A certified copy of the entire transcript of record of the case, including the proceedings in the Supreme Court of Michigan, is hereto annexed as an exhibit.

WHEREFORE, your petitioner prays that this, its petition for the writ of certiorari to the Supreme Court of Michigan, may be granted in this case, that the record in said court may be brought before this Honorable Court for final review and determination, and that upon final hearing the said judgment of the Supreme Court of Michigan may be reversed.

Respectfully submitted,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

By R. N. Van Doren
Frank A. Bell

Counsel for Petitioner.

IN THE

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Respondents.

NOTICE OF SUBMISSION OF APPLICATION FOR WRIT OF CERTIORARI.

To the Respondents:

Please take notice that on Monday, the 2nd day of ~~February~~ March, 1925, upon the opening of court, or as soon thereafter as counsel can be heard, at the court room of the Supreme Court of the United States in the Capitol Building, Washington, D. C., we shall submit to the court the accompanying petition for the issuance of a writ of certiorari to be directed to the Supreme Court of the State of Michigan, in the above entitled cause, submitting in support thereof the accompanying brief, and presenting as an exhibit to said petition a certified

copy of the entire transcript of record of said cause before the Supreme Court of Michigan, including the proceedings in said court.

R. N. Van Dorex

Frank A. Bell

Counsel for Petitioner.

(Proof of service of foregoing Notice on Counsel for Respondents is on file with the Clerk of this court.)

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Respondents.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The facts, issues and proceedings involved in the state court, with references to the transcript of record below, as set forth in the petition filed herein, briefly show the matters involved and the general reasons relied upon for allowance of the writ. The petitioner relies upon the following authorities in support of its petition:

I.

THERE IS A FEDERAL QUESTION INVOLVED IN THIS CASE.

Southern Ry. Co. v. *Prescott*, 240 U. S. 632.

Georgia, etc. R. Co. v. *Blish Milling Co.* 241 U. S. 190.

Cincinnati, etc. R. Co. v. *Rankin*, 241 U. S. 319.

N. Y. C. R. R. Co. v. *York & Whitney*, 256 U. S. 406.

Michigan Central R. Co. v. *Mark Owen & Co.* 256 U. S. 427.

Yazoo & Miss. Valley R. Co. v. *Nichols & Co.* 256 U. S. 540.

II.

THE SUPREME COURT OF MICHIGAN PLACED AN ERRONEOUS CONSTRUCTION UPON THE CASE OF MICHIGAN CENTRAL R. CO. V. MARK OWEN & CO. 256 U. S. 427.

III.

UNDER MICHIGAN LAW THE RIGHT TO HOLD A GARNISHEE DEFENDANT LIABLE DEPENDS UPON THE STATE OF THE CLAIM, AS ONE GARNISHABLE OR NOT, AT THE TIME OF THE SERVICE OF THE WRIT OF GARNISHMENT.

Martz v. *Detroit Fire & Marine Ins. Co.* 28 Mich. 201.

Hitchcock v. *Miller*, 48 Mich. 603; 12 N. W. 871.

Hopson v. *Dinan*, 48 Mich. 612; 12 N. W. 875.

Case v. *Dewey*, 55 Mich. 116; 20 N. W. 817.

Bethel v. *Judge of Superior Court*, 57 Mich. 379; 24 N. W. 112.

ARGUMENT.

I.

THERE IS A FEDERAL QUESTION INVOLVED IN THIS CASE.

The shipment of apples upon which petitioner's liability as garnishee was determined was an interstate shipment made upon the uniform order bill of lading.

The judgment in the Supreme Court of Michigan holds that under the provisions of Section 5 of such bill of lading, petitioner was liable as garnishee upon authority of *Michigan Central Ry. Co.* v. *Mark Owen & Co.* 256 U. S. 427. Section 5 of the bill of lading reads as follows:

> "Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carriers' responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.
>
> The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefore. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage."

The shipment being interstate and therefore subject

to and governed by the laws of Congress and the decisions of the federal courts; the question of law having arisen and been determined upon the provisions of the uniform bill of lading; and the State Supreme Court having applied thereto what it considered the controlling decision of the Supreme Court of the United States; the Federal question involved is clear, as is sustained in the cases cited in Point I of this brief.

II.

THE SUPREME COURT OF MICHIGAN PLACES AN ERRONEOUS CONSTRUCTION UPON THE CASE OF MICHIGAN CENTRAL R. CO. V. MARK OWEN & CO. 256 U. S. 427.

The Supreme Court of Michigan in deciding this case relied entirely upon the case of *Michigan Central R. Co.* v. *Mark Owen & Co.* 256 U. S. 427.

In the *Owen* case this Court considered the question of the liability of the carrier to the consignee under the bill of lading for a loss of a portion of a shipment after the consignee had commenced unloading the same, but within the forty-eight hour period prescribed in the bill of lading. The question so considered was one arising out of the contract relations of the parties and involved the liability of the carrier to the consignee upon and by reason of such a contract. It was held that because of the provisions of Section 5 of the bill of lading (which are the same as in Section 5 of the bill in this case), the responsibility of the carrier to the consignee continued for the period of forty-eight hours after notice of arrival of the shipment had been given. The effect of the decision was to place upon the carrier the duty of policing and protecting cars in process of unloading, and for failure to do so liability should attach.

In the case at bar an entirely different situation is presented. Here the party named in the bill of lading as the one to be notified, paid the draft attached to the bill of lading; presented and surrendered the bill to the carrier's agent at destination; paid the freight charges; accepted the shipment; took possession of the car, and commenced to unload and remove the contents thereof. (Trans., 22-23.) He opened the car and commenced unloading at about eight o'clock in the forenoon, and was continuously in possession of the contents of the car and actually and actively engaged in unloading it from that time until the car was wholly unloaded. (Trans., 23 and 25.) The defendant (notify party) was personally in the car superintending the unloading and had unloaded about one-fourth of the bulk of the apples when the garnishee summons in this case was served upon petitioner at about 9:45 o'clock in the forenoon of the same day on which the defendant accepted and commenced unloading the car. (Trans., 23.)

On the first appeal the Supreme Court of Michigan, after referring to and quoting from the *Owen* case said:

> "If the railway company be liable as carrier it must also follow that the apples remaining in the car before the expiration of that period are within the custody, control and possession of the carrier. We are impressed that under the foregoing construction of Section 5, we must hold that defendant railway had property in its custody and under its control belonging to the principal defendant when the summons was served." (194 N. W. 1014.)

This is carrying the effect of the decision in the *Owen* case far beyond its scope and outside of any issue that was or could have been decided in that case.

True, in the *Owen* case, this court said:

> "Pending that time (during the forty-eight hours) it was within the custody of the railroad company, the company having the same relation

to it that the company acquired by its receipt and had during its transportation."

But this was said with relation to the privity existing between carrier and consignee under their contract. It was said with relation to *liability* of the carrier to the consignee. For the purpose of guarding its liability it was held to have had such custody of the shipment as was necessary.

In the case at bar everything the carrier could do to effect delivery had been done. It was no longer in possession of the shipment. The consignee had paid the draft and surrendered the bill of lading and paid the freight charges. He was the absolute and undisputed owner of the goods and entitled to the possession and control thereof except for such limited purposes as may have been necessary to enable petitioner to protect the shipment.

Petitioner had no right to disturb or interrupt defendant in his unloading of the shipment. Had it attempted to do so it would have been a trespasser. Yet, to support the judgment of the Supreme Court of Michigan, petitioner must be held to have been under the necessity of committing such a trespass.

No way has been shown by which petitioner could have protected itself against the judgment of the Supreme Court of Michigan. If liable as garnishee, how can it proceed to get actual possession of the goods for which it is so held liable? Can it be by a trespass? Certainly not by any possessory process, for as between petitioner and defendant the latter was the owner and entitled to the possession of the goods.

Much more might be said in support of the foregoing, but we believe sufficient has been said to show the error of the judgment rendered by the Supreme Court of Michigan.

III.

UNDER MICHIGAN LAW THE RIGHT TO HOLD A GARNISHEE DEFENDANT LIABLE DEPENDS UPON THE STATE OF THE CLAIM, AS ONE GARNISHABLE OR NOT, AT THE TIME OF THE SERVICE OF THE WRIT OF GARNISHMENT.

This rule is well established in Michigan, and it was cited and referred to by the trial court in its opinion on the first appeal. (See authorities cited on p. 12 of this brief.)

Such being the law of Michigan, petitioner maintains that at the time of the service of the writ of garnishment *it had in its possession or under its control, no property for which it could respond as garnishee.

No construction or application of the *Owen* case (256 U. S. 427) can possibly subject petitioner to liability as garnishee while the owner and consignee of the shipment is in actual and exclusive possession thereof, and when there is no proof or claim of any circumstances giving rise to the exercise of any custody of the goods by the carrier. No occasion existed for an assumption of possession or control by petitioner, for the consignee was in possession and unloaded and took delivery of the entire contents of the car.

Conclusion.

The decision of the Supreme Court of Michigan misconstrued and misapplied the doctrine of the *Owen* case (256 U. S. 427), and by its judgment subjected peti-

*The Michigan garnishment statute (Comp. Laws, 1915, Vol. 3, sec. 13122, p. 4634) requires of plaintiff an affidavit stating that he has good reason to believe that the garnishee

"* * * has property, money, goods, chattels, credits or effects in his hands or under his custody or control belonging to the defendant," etc.

tioner to a liability for which it is in no way responsible, and for relief from which it has no recourse of escape. It applied a rule based upon contract to the advantage of a third party with whom petitioner had no relations, contractual or otherwise, and made petitioner respond in a substantial sum to such party, when under the *Owen* case it was not liable even to the consignee under the facts in this case. This conclusion and decision we submit was erroneous.

We submit that the petition should be granted and that in due course the decision of the Supreme Court of Michigan should be reversed.

P. N. Van Doren

Frank A. Bell

Counsel for Petitioner.